

1 NOT FOR PUBLICATION  
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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 United States of America,  
10 Plaintiff,

11 v.

12 Artemio Pena-Torrecillas,  
13 Defendant/Movant.  
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No. CV-16-04285-PHX-SRB(MHB)  
CR-11-00731-PHX-SRB  
**ORDER**

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16 Defendant/Movant, Artemio Pena-Torrecillas, filed his Motion under 28 U.S.C.  
17 § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody on  
18 December 6, 2016. The Government responded in Opposition and Movant filed a Reply.  
19 The Government filed a Sur-Reply to which Movant filed a Reply. In his motion Movant  
20 raised three grounds for relief. He claimed that he received ineffective assistance of  
21 counsel with regard to his guilty plea, that his “substitute counsel” was ineffective, had a  
22 conflict of interest, and “committed grave mistakes” and that his appellate counsel was  
23 ineffective in failing to raise certain issues on appeal. In his Reply, Movant raised  
24 additional claims challenging the calculation of his base offense level under the United  
25 States Sentencing Guidelines, claiming that he was wrongly assessed a leadership  
26 enhancement for his role in the offense and claiming that his defense attorney was  
27 ineffective for failing to object to or correct either of these alleged guideline calculation  
28 errors. The Magistrate Judge issued her Report and Recommendation on November 8,

1 2018, to which Movant filed timely written objections. The Magistrate Judge  
2 recommended that the motion be denied and that a certificate of appealability also be  
3 denied.

4 Although Movant raised numerous grounds in his Motion and Reply, as detailed  
5 above, his objections are directed to only a few of them. Therefore, this Court will only  
6 make a *de novo* review of the claims in his Motion and/or Reply to which Movant has  
7 raised objections to the Magistrate Judge's Report and Recommendation.

8 Movant's objections are limited to his claims that his offense level was improperly  
9 calculated, that he was granted a leadership role adjustment in error, and that his lawyer  
10 was ineffective in failing to object to these errors at sentencing. Movant also objects to the  
11 Magistrate Judge's recommendation that his claim that he was improperly sentenced to a  
12 ten year consecutive sentence failed to show ineffective assistance of appellate counsel.

13 Movant's first objection is that because the jury found him guilty of three counts  
14 that included the finding that in each count he was in possession with intent to distribute  
15 of 500 grams of methamphetamine or more, that the total about of methamphetamine the  
16 jury found he possessed was 1,500 grams and 1,500 grams corresponds to guideline offense  
17 level 34. Movant's objection and his argument in his Reply in support of his Motion reflect  
18 that he misunderstands how the guidelines are calculated. The jury's finding in three counts  
19 that the amount of methamphetamine involved weighed 500 grams or more does not limit  
20 the Court in making its guideline calculation to 1,500 grams as Movant argues. The  
21 guideline calculation is based on the evidence at trial that the total weight of the  
22 methamphetamine involved in the counts of conviction was sufficient to place Movant's  
23 offense level at 38. Movant's objection is overruled.<sup>1</sup>

24 Movant also claims that he was denied effective assistance of counsel because his  
25 lawyer failed to argue that he was wrongly assessed a leadership enhancement for his role  
26 in the offense. In his objection, Movant argues that in any conspiracy charge can be only

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27 <sup>1</sup> The Magistrate Judge correctly concluded that this claim and the leadership enhancement  
28 claim are analyzed only for ineffective assistance of counsel because Movant claims that  
the base offense level and leadership enhancement were wrong are procedurally defaulted  
as they were not raised on direct appeal.

1 one leader not two and, therefore, because one of his co-defendants was stated to be the  
2 leader in the Indictment he could not also be assessed a leadership enhancement. As the  
3 Magistrate Judge discussed, the record in this case reflects that Movant's lawyer did object  
4 to the leadership enhancement at sentencing and argued against it. The Magistrate Judge  
5 quoted specific portions of counsel's argument against the leadership enhancement. It was  
6 the Court that rejected Movant's counsel's argument. There can be no ineffective assistance  
7 of counsel for failing to make an objection that counsel did make. The objection is  
8 overruled.

9 Movant's third objection concerns his view that he could only be sentenced to the  
10 mandatory minimum sentence of five years for his 18 U.S.C. § 924(c) conviction. Movant  
11 mistakenly claims that 18 U.S.C. § 924(c)(1)(A)(i) is "a mandatory provision of a sentence  
12 not to exceed five years." (Movant's objection, Doc. 32 at 3) Movant asserts that only if he  
13 discharged a firearm could he be given a ten year sentence for his firearms conviction.  
14 Movant is wrong. The five year term in 18 U.S.C. § 924(c)(1)(A)(i) sentence is a mandatory  
15 minimum, not maximum, sentence. It does not limit the sentence to five years. The Court  
16 explained in detail its reasons why a sentence greater than the mandatory minimum was  
17 appropriate in this case. In the Report and Recommendation, the Magistrate Judge quoted  
18 extensively from the sentencing transcript wherein the Court explained why a sentence  
19 greater than the five year mandatory minimum for possession of a firearm in furtherance  
20 of a drug trafficking offense was being imposed. His appellate lawyer was not ineffective  
21 in failing to raise this meritless issue on appeal. Movant's objection is overruled.

22 IT IS ORDERED overruling Movant's Objections to the Report and  
23 Recommendation of the Magistrate Judge.


24 IT IS FURTHER ORDERED adopting the Report and Recommendation of the  
25 Magistrate Judge as the Order of this Court. (Doc. 29)

26 IT IS FURTHER ORDERED denying and dismissing with prejudice Movant's  
27 Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in  
28 Federal Custody. (Doc. 1)

1 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to  
2 proceed *in forma pauperis* because Movant has not made a substantial showing of the  
3 denial of a constitutional right and because denial is justified by a plain procedural bar and  
4 jurists of reason would not find the procedural ruling debatable.

5 IT IS FURTHER ORDERED directing the Clerk to enter judgment accordingly.  
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7 Dated this 18th day of January, 2019.  
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12 Susan R. Bolton  
13 United States District Judge  
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